Office - Supreme Court, U.S.
FILED
DEC 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-1083

In the Supreme Court of the United States

OCTOBER TERM, 1984

L. ANN WEST, as Mother and Administrator of the Estate of LORRI WEST, L. ANN WEST, Individually, STANLEY G. WEST, Individually, and L. ANN WEST and STANLEY G. WEST, as Parents and Guardians of LINDSAY WEST,

Plaintiffs-Petitioners,

v.

UNITED STATES OF AMERICA,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether or not the Seventh Circuit Court of Appeals upon rehearing *en banc* erroneously vacated by equally divided vote the decision of the original panel that the *Feres* doctrine does not bar an action under the Tort Claims Act brought by civilian children for physical injuries suffered by them under circumstances where there was no injury to the serviceman father which could give rise to his own action under the Tort Claims Act.

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In the
Supreme Court of the United States

OCTOBER TERM, 1984

NO.

L. ANN WEST, as Mother and Administrator of the Estate of **LORRI WEST**, **L. ANN WEST**, Individually, **STANLEY G. WEST**, Individually, and **L. ANN WEST** and **STANLEY G. WEST**, as Parents and Guardians of **LINDSAY WEST**,

Plaintiffs-Petitioners,

v.

UNITED STATES OF AMERICA,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

The panel of the Seventh Circuit Court of Appeals rendered their decision on March 14, 1984. *West* v. *United States*, 729 F.2d 1120 (7th Cir. 1984).

On June 25, 1984, the Seventh Circuit Court of Appeals vacated the panel decision and granted a hearing *en banc*.

On October 4, 1984, in an unpublished order, by equally divided vote, the Seventh Circuit Court of Appeals *en banc* affirmed the judgment of the district court entered on April 8, 1983.

Plaintiffs petition this Court for Writ of Certiorari pursuant to 28 U.S.C. §1254(1) and United States Supreme Court Rule 19.

STATUTES INVOLVED

28 U.S.C.
§2671 Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the military departments.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C.
§2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefits the action was brought, in lieu thereof.

28 U.S.C.
§2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to:

a. Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

j. Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

k. Any claim arising in a foreign country.

STATEMENT OF THE CASE

The Plaintiffs' Complaint alleged that Stanley West was inducted into the United States Army on January 15, 1971. Prior to his induction, he underwent a pre-induction physical examination at which time the Army doctors took a blood sample. These Army physicians negligently mistyped Stanley West's blood as being "A-Negative" when in fact it was "A-Positive." After his induction into the United States Army, Stanley West received his identification ("dog") tags which listed his blood type as "A-Negative."

In 1973, Stanley West was discharged from the Army and married L. Ann West. Mrs. West's blood type is "A-Negative." On March 21, 1979, Mrs. West gave birth to twin daughters, Lindsay and Lorri, in Galesburg, Illinois. Both of the children were born with birth defects resulting from the incompatibility between their parents' blood types. Lorri West died within one week. Lindsay West survived but she has continued to undergo extensive medical treatment on account of the birth defects. The parents, Stanley and Ann West, were not physically injured by the Army's negligence. Their claims all derive from the injuries to their daughters.

The Wests filed their Complaint under the Tort Claims Act, 28 U.S.C. §1346 and §§2671-2680. The United States filed a Motion to Dismiss the Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The District Court granted the Motion to Dismiss on the basis that subject matter jurisdiction was lacking under the doctrine of *Feres* v. *United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159 (1950).

The Plaintiffs appealed the District Court's Order to the Seventh Circuit Court of Appeals. A panel of the

Seventh Circuit Court of Appeals reversed the decision of the District Court on March 14, 1984. *West* v. *United States*, 729 F.2d 1120 (7th Cir. 1984).

The United States filed a Petition for Rehearing and Suggestion for Rehearing *En Banc* which was granted on June 25, 1984. The panel which originally heard the case voted to deny rehearing, but a majority of the active members of the Seventh Circuit Court of Appeals voted to grant a hearing *en banc*. As part of this order, the Seventh Circuit Court of Appeals vacated the decision rendered by the panel on March 14, 1984.

On October 4, 1984, in an unpublished order, the Seventh Circuit Court of Appeals sitting *en banc*, by equally divided vote, affirmed the judgment of the District Court which dismissed the Complaint for lack of subject matter jurisdiction under *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153 (1950).

The Wests petition this Court for a Writ of Certiorari pursuant to 28 U.S.C. §1254(1) and United States Supreme Court Rule 19.

ARGUMENT

THE SEVENTH CIRCUIT COURT OF APPEALS COMMITTED ERROR RESULTING IN THE NEED OF THIS COURT TO PROVIDE GUIDANCE AND CONSISTENCY WHEN THE SEVENTH CIRCUIT COURT OF APPEALS EN BANC BY EQUALLY DIVIDED VOTE HELD THAT THE FERES DOCTRINE BARRED AN ACTION UNDER THE TORT CLAIMS ACT BROUGHT BY CIVILIAN CHILDREN FOR PHYSICAL INJURIES SUFFERED DIRECTLY BY THEM WHERE THERE WAS NO INJURY TO THE SERVICEMAN FATHER WHICH COULD GIVE RISE TO HIS OWN ACTION UNDER THE TORT CLAIMS ACT.

The time has come for this Court to provide its guidance for the proper balance between the protection of military discipline and the rights of injured civilians under the Tort Claims Act. The first policy is the need to insulate the military from liability in order to protect the peculiar and special relationship of the soldier to his superiors and to reduce the adverse effects upon military discipline resulting from lawsuits under the Tort Claims Act. *Chappell v. Wallace*, ... U.S. ....., 103 S.Ct. 2362, 2365 (1983). At the same time, this Court has the obligation to protect the rights of private individuals who have suffered at the hands of the military and to give full effect to the intentions of Congress for the enforcement of the rights of such individuals through the Tort Claims Act. 28 U.S.C. §§2671-2680.

All prior decisions by the Court which involved the analysis of the application of the *Feres* doctrine presented circumstances where the injury was to the serviceman himself or there was a derivative action based upon an under-

lying injury to the serviceman. See, *Brooks* v. *United States*, 337 U.S. 49, 69 S.Ct. 918 (1949); *Feres* v. *United States*, 340 U.S. 135, 71 S.Ct. 153 (1950); *United States* v. *Brown*, 348 U.S. 110, 75 S.Ct. 141 (1954); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 97 S.Ct. 2054 (1977); *Chappell* v. *Wallace*, ... U.S. ....., 103 S.Ct. 2362 (1983). When a derivative claim of indemnity was founded upon an underlying injury to a civilian employee of the Navy, the Court gave full consideration to the involvement of the Tort Claims Act without any consideration of the need to question whether or not the *Feres* doctrine should apply. *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 103 S.Ct. 1033 (1983).

There are two unique circumstances in this case which require analysis in order to preserve the interests in military discipline while simultaneously allowing for the intended use of the Tort Claims Act. First, Stanley West never suffered any direct injury. Second, the negligent acts of the Army and the injuries to the West children did not occur at the same time such that there was no actionable tort in existence during the active military service of Stanley West.

The original panel of the Seventh Circuit Court of Appeals in this cause observed:

> But the holdings of *Feres* and subsequent Supreme Court decisions do not apply by some inescapable logic to the present claims by a soldier's daughters. The 'derivative injury' and 'independent injury' lines of cases do not provide convenient categories easily applicable to this situation where the children's injuries have a causal connection with their father's military service but not with any military injuries he may have suffered.

West v. *United States*, 729 F.2d 1120, 1124 (7th Cir. 1984).

In a tort cause of action, the negligent act and the injury will usually take place simultaneously. The difficulty in any analysis arises when the injury does not take place until there has been some passage of time between the act of negligence and the resulting injury. The unique circumstances of the *West* case present such a difficulty. The acts of negligence in mistyping Stanley West's blood occurred either at the pre-induction physical examination or shortly after his induction into the Army when he was issued his identification tags, all of which occurred in 1971. Yet, the element of injury or damage which is necessary to complete the tort did not come into being until the birth of Lindsay and Lorri West in 1979.

The significance of this unique circumstance cannot be unduly emphasized. Neither Stanley West nor any member of his family could have brought an action under the Tort Claims Act during the time of his active military service. It is axiomatic that all elements of a tort, including damages, must be present before a cause of action is possible.

It may be posited that by means of artful pleading Stanley West could have claimed injuries to himself on a legal theory of infliction of emotional distress or misrepresentation. Such a contention could be used in order to construe the circumstances of this case as involving an injury to Stanley West in order to claim that this case actually involves an injury to a serviceman and arguably the occurrence of such an injury during his active military service. However, the contention that either of these two theories of law may apply must give acknowledgement to the fact that both of these theories of tort law also require the existence of an element of damage before they can be legally asserted. Furthermore, even if it could be viably contended that either of these causes of action

were available to Stanley West, the fact remains that the claims of the West children are in no way derivative of any possible claim for emotional distress or misrepresentation to their father.

Under the unique circumstances of this case, it is important that full consideration is given to the rights of a civilian litigant under the Tort Claims Act in light of the possible application of the *Feres* doctrine. Such an analysis is shown by the decision of the Seventh Circuit Court of Appeals panel in this cause. *West* v. *United States*, 729 F.2d 1120 (7th Cir. 1984).

Unfortunately, only confusion results from the reversal of that panel decision. The decision of the Seventh Circuit Court of Appeals sitting *en banc* resulted from an equally divided vote. Unlike the panel decision, the order of the court *en banc* is an unpublished order and fails to give any insight whatsoever into the legal analysis leading to that result.

In summary, this Court has before it a case where it is fully aware of the legal reasoning applied by one-half of the Seventh Circuit Court of Appeals sitting *en banc* (panel decision), but it can only hypothesize what legal rationale was applied by that half of the Seventh Circuit Court of Appeals *en banc* whose decision currently has the force of law in this cause.

This situation sets forth concretely the confusion of the lower courts as to what constitutes the proper guidelines for a decision on whether or not *Feres* applies to bar a civilian claim under the Tort Claims Act. Taking into consideration that legal setting, as well as the factual setting that there was no injury to the serviceman and that there were distinct times of occurrence for the negligent act and damage elements of the tort involved in this cause, the Court is presented with an important question of fed-

eral law which requires the guidance of the Court in order to ensure a consistency in the application of the *Feres* doctrine where it does not encroach upon the rights of civilians under the Tort Claims Act.

The *Feres* doctrine is a judicially created exception to the waiver of sovereign immunity contained within the Tort Claims Act. In *Feres*, the Court held that the waiver of sovereign immunity contained within the Tort Claims Act did not apply to a claim brought by or on behalf of a serviceman who, while on active duty, sustained injury due to the negligence of others in the armed forces. This bar to any action under the Tort Claims Act also applied to derivative claims such as a wrongful death or loss of consortium claim which arose out of an underlying injury to the serviceman while on active duty.

In determining the intent of Congress, the Court observed that 16 of the 18 tort claim bills introduced prior to the final version of the Tort Claims Act expressly denied recovery to members of the armed forces.

Furthermore, the Act only made the United States and its representatives liable in tort claims "*. . . in the same manner and to the same extent as a private individual under like circumstances . . . .*" 28 U.S.C. §2674. Prior American law did not have any analogous private right of action for a soldier whereby he was allowed to recover for the negligence of his superiors.

While the Court at that time felt that it was proper not to create a new cause of action where no private right of action had previously existed, the evolution of the *Feres* doctrine has placed primary importance upon the unique relationship between a soldier and his superiors and the need to protect its foundation of discipline from the effects produced by the maintenance of lawsuits against the mili-

tary services. *Chappell* v. *Wallace*, ... U.S. ....., 103 S.Ct. 2362, 2365 (1983).

At the same time, the Tort Claims Act expressly subjects the military services to civil liability where representatives of the military have acted negligently. Members of the military services are specifically identified as "employees of the government" for whom the United States may bear responsibility under a *respondeat superior* doctrine. The definitions of the Act specifically state that servicemen acting in the line of duty are included within the definition of "acting within the scope of his office or employment." 28 U.S.C. §§2671, 1346(b).

Congress foresaw the necessity of providing governmental agencies, including the military services, protection from internal disruption by imposing an immunity from suit in situations involving the exercise or failure to exercise a discretionary function by governmental personnel, where a claim arises out of combatant activities during time of war and where a claim arises in a foreign country. 28 U.S.C. §2680(i), (j) (k).

In other words, the protection of military discipline from the detrimental effects upon it brought about by lawsuits is not an absolute. Civilians, including relatives of servicemen, have the right to bring suit for injuries under the Tort Claims Act when members of the military service are negligent while on active duty. *Smith* v. *Pena*, 621 F.2d 873 (7th Cir. 1980); *Lutz* v. *United States*, 685 F.2d 1178 (9th Cir. 1982); *Jackson* v. *Kelley*, 557 F.2d 735 (10th Cir. 1977); *Rewis* v. *United States*, 395 F.2d 595 (5th Cir. 1966); *see also West* v. *United States*, 729 F.2d 1120, 1125, 1127 n.6 (7th Cir. 1984).

Before the policies underlying the *Feres* doctrine are applied to a case setting to determine the possible applica-

tion of the doctrine, there is a background question as to whether or not the circumstances of the case merit any consideration for promotion of the policy to protect military discipline. While this may appear to be a redundancy, its significance lies in the recognition that both *Feres* cases and Tort Claims Act cases against the military where *Feres* is not applied have the common element that military personnel have acted negligently while acting within the scope of their employment.

In this regard, since lawsuits against the military services are allowable under the Tort Claims Act, the fact that the lawsuit is based upon negligent conduct of military personnel is not sufficient to invoke the need of the protection of military discipline. Applying this understanding to an analysis under the *Feres* doctrine, the negligent conduct of military personnel alone is not sufficient to make the claim arise out of or occur in the course of activity incident to service such that the *Feres* doctrine applies.

Certainly, the fact that a claim is founded upon the negligence of military personnel in the plain meaning of the terms makes that claim "incidental to military activity." However, that incidental connection to military activity is not sufficient in and of itself to mandate an analysis under the *Feres* doctrine.

A comparison of the decisions of the Court in *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 97 S.Ct. 2054 (1977) and *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 103 S.Ct. 1033 (1983) clarifies this point. In both cases, the direct action by the injured plaintiff involved an allegation of active negligence on the part of military personnel. In both cases, there was a derivative claim of indemnity under the Tort Claims Act which arose out of the negligence of the military personnel

towards the injured plaintiff. Yet, the analysis in both cases from the perspective of the application of the *Feres* doctrine is markedly different. In *Stencel*, the Court held that the third party indemnity action was barred for essentially the same reasons that the direct action was barred under the *Feres* doctrine. In *Lockheed*, the Court did not even consider whether or not the policies underlying *Feres* applied.

In *Stencel*, the identified factors underlying the application of the *Feres* doctrine were: first, that the relationship between the government and members of its armed forces is "distinctively federal in character;" second, that the injured plaintiff benefitted from a statutory compensatory scheme which operated as a substitute for tort liability; and third, that the maintenance of lawsuits under the Tort Claims Act would have a disruptive effect upon the relationship of a soldier to his superior and the discipline necessary to maintain that relationship.

Even though these same factors arguably applied in the *Lockheed* case, the Court did not even consider whether or not their application was significant enough to bar the indemnity claim on the basis of the *Feres* doctrine.

First, in *Lockheed*, the plaintiff was a civilian employee of the Navy who died in a crash of an aircraft operated by Air Force personnel in South Vietnam. In addition, the relationship between the United States and the defendant manufacturer of the aircraft in *Lockheed* was similar to the relationship between the United States and the defendant manufacturer in the *Stencel* case. Both Stencel Aero Engineering Corp. and Lockheed Aircraft Corp. were suppliers of ordnance to the United States armed services. The relationship of the parties in *Stencel* was no more "distinctively federal in character" than the relationship of the parties in the *Lockheed* decision.

Second, in *Lockheed*, the injured party received compensatory benefits for his injury under the Federal Employees Compensation Act which acted as a substitute for tort liability. This setting was substantially similar to that in *Stencel* where the injured soldier was compensated under the Veteran's Benefit Act. The only point of distinction between the two compensatory schemes is that under the Federal Employees Compensation Act there is an exclusive liability provision which prohibits the injured party from suing the United States. 5 U.S.C. §8116(c).

It is only upon consideration of the third factor of the *Feres* test that a distinction develops between the two cases which supports the policy rationale of *Feres* acting as a bar to a tort claim indemnity action in *Stencel* but not in *Lockheed*. In *Stencel*, the plaintiff was a national guard officer injured while acting within the scope of his employment. In *Lockheed*, the plaintiff was a civilian employee of the United States Navy who was injured while acting within the scope of his employment. Certainly, the necessity of maintaining military discipline and the prevention of second-guessing military orders are policy factors which support the result in the *Stencel* case. At the same time, the need for discipline between military superiors and civilian employees and the prevention of second-guessing military orders in a military-civilian setting are policy factors which did not merit any intrusion upon the application of the Tort Claims Act in the *Lockheed* case.

It is noteworthy that the decision in *Stencel* which barred the indemnity claim under the rationale of the *Feres* doctrine was limited in its application to that situation where the injured party was a serviceman. *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 674, 97 S.Ct. 2054, 2059 (1977).

The danger in the application of the *Feres* doctrine factors is that the doctrine may be given a more widespread application than the Court intends. See *Stencel*, 431 U.S. at 675-77, 97 S.Ct. at 2059-2060 (Marshall, J., dissenting). A comparison of the *Stencel* and *Lockheed* decisions shows that the policy factors underlying *Feres* could apply in both instances. However, it appears the Court only intended the *Feres* doctrine to apply in the *Stencel* setting where the injured party was a serviceman. The issue of the application of the *Feres* doctrine to a case where the injured party is a civilian child represents an important question of federal law in need of present guidance from the Court.

This danger is exemplified by the confusion of the lower courts on the importance given to the status and activity of the alleged negligent parties in weighing the application of the *Feres* doctrine. Some courts have applied a *per se* rule by which the consideration of the time and circumstances surrounding the negligent act becomes the main factor in the test. *Heilman* v. *United States*, 731 F.2d 1104, 1006-1107 (3rd Cir. 1984); *Scales* v. *United States*, 685 F.2d 970, 973 (5th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1772 (1983); *Monaco* v. *United States*, 661 F.2d 129, 132-133 (9th Cir. 1982), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2269 (1982). (See, *West* v. *United States*, No. 82-1235, Slip op. at 6-7 (D.C.Ill. April 8, 1983).) Other courts have given little emphasis to this factor. Instead, their inquiry is whether military discipline will be impeded if the challenged conduct is litigated in a civil action. *Brown* v. *United States*, 739 F.2d 362, 366-370 (8th Cir. 1984); *Johnson* v. *United States*, 704 F.2d 1431, 1436-1441 (9th Cir. 1983); *West* v. *United States*, 729 F.2d 1120, 1123-1128 (7th Cir. 1984). The guidance of this Court is needed as the *per se* rule encroaches upon the rights of civilians under

the Tort Claims Act without any real consideration of the need to protect military discipline.

Applying the factors of the *Feres* doctrine to our case, it is apparent that there is no "distinctively federal" relationship between the children and the United States. The children are not entitled to any benefits under alternative government compensation systems such as the Veteran's Benefit Act. Certainly, the need to maintain military discipline is weaker when the relationship is between children and the United States than when the relationship being examined is that between a civilian employee and the United States Navy as it was in the *Lockheed* case. After extensive examination of the policy considerations under *Feres* in relation to the claims of the West children, the original panel of the Seventh Circuit Court of Appeals concluded that none of the policy considerations applied to bar the children's claims. *West* v. *United States*, 729 F.2d 1124-1128 (7th Cir. 1984).

The rationale for the preservation of military discipline is embodied in the following language:

> The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. The Court has often noted "the peculiar and special relationship of the soldier to his superiors," . . . and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . ."

Chappell v. *Wallace*, ... U.S. ....., 103 S.Ct. 2362, 2365 (1983) (citations omitted).

Certain parameters have been established by lower courts for the determination of whether or not the *Feres* doctrine

applies to preserve military discipline. See *West* v. *United States*, 729 F.2d 1120, 1123-1125 (7th Cir. 1984). If a serviceman is injured by the negligent acts of other military personnel while he is on active duty, then the need to preserve military discipline bars his claim under the Tort Claims Act. If a civilian or a relative of a serviceman incurs injury directly from the negligence of a representative of the armed services, then the civilian or relative of a serviceman is allowed to bring a claim under the Tort Claims Act. This is true even if the injury occurs during the active military service of a spouse or parent. *Costly* v. *United States*, 181 F.2d 723 (5th Cir. 1950).

Where the negligent actions of the United States cause an injury to a serviceman on active duty, the claims of relatives for their own injury are barred by the *Feres* doctrine if their injury is derivative or had its genesis from the initial injury to the serviceman. *Lombard* v. *United States*, 690 F.2d 215 (D.C.Cir. 1982) (radiation), *cert. denied*, ... U.S. ....., 103 S.Ct. 3086 (1984); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982) (rubella exposure), *cert. denied*, ... U.S. ....., 103 S.Ct. 1772 (1983); *In re Agent Orange Product Liability Litigation*, 506 F.Supp. 762, 776-81 (E.D.N.Y. 1980) (herbicides). But see, *In re Agent Orange Product Liability Litigation*, 580 F.Supp. 1242, 1247-1254 (E.D.N.Y. 1984).

Where the negligent acts of the United States cause injury to a serviceman, the related claims of his relation which are proximately caused by his own actions are arguably not barred by the *Feres* doctrine. See *Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978) and *Johnson* v. *United States*, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007 (1981). While the government apparently never even raised a *Feres* defense in the

first *Johnson* case, the result can best be explained by the fact that the injury to the serviceman's wife was separate and distinct from the injury to the serviceman. Hence, her injury was not derivative nor did it have its genesis in the injury to the serviceman. See *Orken* v. *United States*, 239 F.2d 850 (6th Cir. 1956).

Stanley West did not suffer any injury directly to himself, either at the time of his active service or at the time of the injuries to his daughters. The injuries to his daughters did not have their genesis nor were they derivative of any injury to him which occurred during his active military service. The policy to protect military discipline in order to ensure the result of immediate and full compliance with military procedures and orders between a serviceman and his superiors has little if any application in this factual setting. If the West children are allowed to pursue their claim under the Tort Claims Act, the examination of the service relationship of Mr. West to his superiors will take place at a time when that relationship is no longer in force. Equally important, under fundamental principles of tort law, the military relationship between Mr. West and his superiors was never subject to question by a claim under the Tort Claims Act until the damage element of the cause of action was present. This did not occur until approximately six years after he was discharged from the United States Army.

The Wests respectfully request this Court to grant their Petition for Certiorari in order to provide guidance and consistency in the determination as to when the *Feres* doctrine applies and the method of application to be used

in order to determine whether or not a Tort Claims Act claim by civilian children is barred by the *Feres* doctrine.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

L. ANN WEST, as mother and administrator of the Estate of LORRI WEST, L. ANN WEST, individually, STANLEY G. WEST, individually and L. ANN WEST and STANLEY G. WEST, as parents and guardians of LINDSAY WEST,	)	
	)	No. 82-1235
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

Plaintiffs have filed a complaint against the United States under the Federal Torts Claim Act (28 U.S.C. §1346(b)) and have fulfilled the necessary prerequisites to file this claim (28 U.S.C. §2401(b) and §2671 et seq). The United States has moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

FACTS:

For the purposes of this motion the Court will presume that the following facts as pled in the complaint are true (*Preston v. United States*, 596 F.2d 232 (7th Cir. 1979), cert. denied 444 U.S. 1915 (1979).

Stanley West was inducted into the Army on or about January 15, 1971. Prior to his induction, Stanley received a pre-induction physical at the Army induction center in Chicago, Illinois. Through the negligence of representatives of the United States at the physical examination, Stanley's blood was mistyped as "A-Negative" when in fact it was "A-Positive". After induction into the Army, Stanley was issued identification tags indicating his blood type to be "A-Negative".

On June 10, 1973, Stanley married L. Ann West who had blood type "A-Negative". Subsequently, in March, 1979, L. Ann West gave birth to twin girls, both of whom suffered from injuries resulting from the incompatability of their parents' blood types.

Plaintiffs claim that they reasonably relied on the negligent misrepresentation of the United States that Stanley's blood type was "A-Negative" and that the negligent mistyping at the pre-induction physical "proximately caused" the defective births of the two girls.

MOTION TO DISMISS:

The United States' motion to dismiss is based on two exceptions to the Federal Torts Claim Act (FTCA). The FTCA represents a Congressional waiver of the doctrine of sovereign immunity and provides exclusive jurisdiction to the district courts over negligence claims against the United States. If Plaintiff's claims fall within an exception to the FTCA, their complaint must be dismissed for lack of subject matter jurisdiction. *Laswell* v. *Brown*, 683 F.2d 261 (8th Cir. 1982).

The Feres Doctrine:

The United States first argues that this action, based on the FTCA, is barred by the exception enunciated in *Feres* v. *United States*, 340 U.S. 135 (1950). There the Supreme

Court examined the applicability of the FTCA to military personnel and concluded:

> ". . . that the government is not liable under the Federal Torts Claim Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the government has been governed exclusively by Federal law. We do not think that Congress, in drafting this Act, created a new cause of action dependent on local law for service connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express Congressional command."

Clearly, if this action arises "out of or in the course of activity incident to service", it is not cognizable under the FTCA.

The issue then arises whether the alleged mistyping of Stanley's blood at his pre-induction physical was "incident to service". It has been held that the pre-induction physical examination for military service is so intertwined with Plaintiff's active military service as to be "incident to service" within the meaning of the *Feres* doctrine. *Redmond* v. *United States*, 331 F.Supp. 1222 (N.D. Ill. 1971); *Kilduff* v. *United States*, 248 F.Supp. 310 (E.D. Va. 1961).

In *Redmond*, Plaintiff's decedent had been inducted into the Army following his pre-induction physical. While in the service decedent requested and received medical examinations and treatment. Subsequently, he was discharged and eventually died from a brain tumor. Plaintiff charged the Defendant United States with negligence in both failing "to discover and diagnose as well as failing to provide adequate medical and diagnostic treatment and examination." *Redmond* at 1223.

The Court, in a brief opinion, recognized the doctrine enunciated in *Feres*, as well as its inapplicability to individuals not a member of the armed forces or servicemen acting on their own time. The court, in dismissing the complaint, held:

> "What is crucial in this case is the occurrence of the alleged negligent conduct. And since this conduct was performed by the Army, in the course of decedent's service or in determining whether he was qualified to serve, the conduct is inseparably intertwined, as the *Healy* court said, with the decedent's active military service."

The case upon which the court relied, *Healy* v. *U.S.*, 192 F.Supp. 325 (S.D. N.Y. 1961) aff'd 295 F.2d 958, involved a Plaintiff who was attempting to recover for the "negligent and careless certification by Air Force doctors" of him at his pre-induction physical when in fact he had a heart condition which was aggravated by his basic training. The court found that Plaintiff's induction into the Air Force did not, in itself, cause his injury, rather it was his activities during basic training. However, the Court held:

> "*The original claimed negligent examination cannot be separated from the ultimate injury.* Here the injury is inseparably intertwined with, and related to, plaintiff's active military service. Except for compliance with orders of his superiors while in service, the injuries would not have occurred." (Emphasis added).

Accordingly, the *Feres* doctrine compelled the dismissal of the action.

The Court expressly left unresolved the situation where "every essential element constituting the cause of action occurred during the course of the pre-induction examination" (fn. 11, *Healy* at 328).

In *Joseph* v. *U.S.*, 505 F.2d 525 (7th Cir. 1974), the Court again examined this issue. The Court stated that

the language in *Redmond* which would conceivably bar a claim by an individual who was negligently injured at the time of his pre-induction physical was "highly questionable". The Court gave an example in which the Government could be subject to liability, namely if an inductee received an x-ray burn during the examination.

The Plaintiff in *Joseph* was attempting to recover for the aggravation of his flat feet condition during basic training. His argument was that the Government's negligence occurred when he was a civilian, i.e. at his pre-induction physical. Basically, his position is that had his infirmity been discovered at that time, he would not have been inducted into the military, and his condition would not have been aggravated. However, the Court found that Plaintiff's injuries were not caused by the physical examination but rather by his activity once in the service. Thus, the *Joseph* holding was nearly identical to that in *Healy* and the complaint was dismissed based on *Feres*.

Consequently, neither *Healy* nor *Joseph* are determinative as to whether a pre-induction physical is incident to service. In both of those cases the injury was clearly sustained "in the course of activity incident to service". The Court in *Healy* did state, however, that the pre-induction physical could not be separated from the ultimate injury.

The *Remond* case involved alleged negligent failures both at the pre-induction physical and during decedent's military service. The Court's holding indicated that negligence at either time was inseparably intertwined with the decedent's active military service.

The *Redmond* position was again examined in the case of *Thompson* v. *United States ex. rel. Brown*, 493 F.Supp. 28 (W.D. Okla. 1980). The Court, relying in part on *Redmond*, noted that the pre-induction physical was a re-

quirement for his induction into service, and thus was incident to his service. The Court in a footnote recognized the criticism of *Redmond* by *Joseph* and indicated that in the case before them no physical injury was inflicted on Plaintiff during the physical examination.

Based on the foregoing, the Court finds that the alleged negligence of the United States occurring at the pre-induction physical was inseparably intertwined with his military service. The physical examination took place at the Army induction center in Chicago and was conducted by agents of the United States Army. Only after having successfully completed his physical examination was Stanley allowed to enter the military. Furthermore, the alleged negligent conduct of the United States was not completed until Plaintiff had been inducted into the Army and had received his identification tags.

Plaintiffs argue that their injury did not occur until their children were conceived or born; however, they allege that their injury was the direct result of the negligent conduct at the pre-induction physical. Plaintiffs cannot escape application of the *Feres* doctrine by claiming that the injury did not become apparent until the children were conceived or born. This is not the determining factor. "Indeed it would be anamolous for a recovery to hinge on a fact as fortuitous as when an injury becomes apparent." *Monaco* v. *United States*, 661 F.2d 129 (9th Cir. 1981), cert. denied ..... U.S. ..... (1982). The Court in *Monaco* noted that "the proper focus in applying the *Feres* doctrine is not the time of injury, but the time of the negligent act". *Monaco*, at 133. *Sevency* v. *U.S. Government, Dept. of Navy*, 550 F.Supp. 653 (D.C. R.I. 1982); *Sheehan* v. *United States*, 542 F.Supp. 18 (S.D. Miss. 1982).

Since any negligent conduct of the United States occurred either while Stanley was in the service (identification tags given to Stanley) or while determining whether

he was qualified for service, the *Feres* doctrine compels dismissal of his claim.

Likewise, it has been consistently held that derivative claims of family members for injuries received incident to service are barred by *Feres*. *Lumbard* v. *United States*, 690 F.2d 215 (D.C. Cir. 1982); *Scales* v. *United States*, 685 F.2d 970 (5th Cir. 1982), rehearing denied 691 F.2d 502 (1982); *Monaco*, supra; *In Re Agent Orange Product Liability Litigation*, 506 F.Supp. 762 (E.D. N.Y. 1980). Even in *Feres*, which involved three separate cases, the Court dismissed the wrongful death claims by widows of deceased servicemen.

Accordingly, the entire complaint is DISMISSED based on the *Feres* doctrine.

Negligent Misrepresentation:

Even though the Court has decided that the complaint is barred by the *Feres* doctrine it will discuss the negligent misrepresentation arguments of the United States. The United States claims that the FTCA does not apply to this action because of the negligent misrepresentation exception. (28 U.S.C. §2680(h)). For the following reasons the Court concludes that the misrepresentation exception would not apply to this situation.

The leading case in this area is *United States* v. *Neustadt*, 366 U.S. 696 (1960) wherein the Supreme Court distinguished negligence from negligent misrepresentation. The Court stated:

> "A claim arises out of 'negligence' rather than 'misrepresentation' when the loss suffered by the injured party is caused by a breach of a specific duty owed by the government to him, i.e. the duty to use due care in obtaining and communicating information upon which the party might reasonably be expected to rely in the conduct of his economic affairs."

The Court in *Neustadt* reviewed certain provisions of the National Housing Act which required the seller of property approved for Federal Housing Administration mortgage insurance to furnish the buyer with a written statement disclosing the FHA appraisal value. While this appraisal was not a guarantee to the purchaser, the FHA had the "duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs". *Neustadt*, at 710.

Thus, the relevant inquiry is whether the injury resulted from a commercial decision based on government misrepresentation rather than the negligent performance of an operational task. *Green* v. *United States*, 629 F.2d 581 (9th Cir. 1980); *Preston* v. *United States*, 596 F.2d 232 (7th Cir. 1979), cert. denied 444 U.S. 915 (1979). It is only the former that are barred by the misrepresentation exception.

The Court finds that Stanley and his wife's decision to have children was not a "commercial decision". The gravamen of the complaint is the negligence of the United States representative in conducting the pre-induction physical examination. Consequently, the misrepresentation exception to the FTCA would not apply in this case.

Based on the foregoing, the United States' motion to dismiss is granted and the Complaint is DISMISSED.

Entered: April 8th, 1983.

Copies sent to:

Mr. Robert Nesemann
Mr. L. Lee Smith
Mr. Daniel B. Limbaugh

/s/ *Michael M. Mihm*
Michael M. Mihm
Judge of the United States District Court

L. Ann WEST, as Mother and Administrator of the Estate of Lorri West, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES of America,

Defendant-Appellee.

No. 82-1842.

United States Court of Appeals,

Seventh Circuit.

Argued Nov. 3, 1983.

Decided March 14, 1984.

Rehearing and Rehearing En Banc

Granted June 25, 1984.*

CUDAHY, Circuit Judge.

This case concerns the application of the Federal Tort Claims Act to injuries suffered by children of members of the armed forces where those injuries are connected with a parent's military service. Under *Feres* v. *United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950), the government is not liable under the Federal Tort Claims Act for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." The complaint in the case before us alleges that a soldier's children were born with birth defects resulting from the Army's negligent mistyping of their father's blood in connection with his pre-induction physical examination. The district court concluded that the *Feres* doctrine barred the action and dismissed the complaint for lack of subject matter jurisdiction.[1] For the reasons stated below, we reverse and remand for further proceedings.

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* Judgment and opinion vacated.

[1] If the FTCA does not provide a remedy, the United States has sovereign immunity against this claim and the federal courts lack subject matter jurisdiction over the claim. *Broudy* v. *United States*, 661 F.2d 125, 127-28 (9th Cir. 1981); *Stanley* v. *Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981).

I.

Because the district court dismissed the complaint for lack of subject matter jurisdiction, we take as true all factual allegations in the complaint and construe them in the light most favorable to the plaintiffs. According to the complaint, Stanley West was inducted into the United States Army on January 15, 1971. Before his induction, Army doctors performed a physical examination which included the taking of a blood sample. After his induction, Stanley received his identification ("dog") tags which listed his blood type as "A-Negative." According to the complaint, Stanley's blood type is actually "A-Positive" and the Army was negligent in mistyping his blood.

In 1973, Stanley was discharged from the Army and married L. Ann West. Ann's blood type is "A-Negative." On March 21, 1979, Ann gave birth to twin daughters, Lindsay and Lorri. Both were born with birth defects resulting from the incompatibility between their parents' blood types. Despite extensive medical treatment, Lorri died when she was one week old. Lindsay survived, but she has required extensive medical treatment for her condition.

The theory of the complaint is that the Army's negligence in mistyping Stanley's blood at his pre-induction physical examination was a proximate cause of Lorri's death and Lindsay's injuries which resulted from the incompatibility between their parents' blood types. We emphasize that the record before us presents no issues concerning proximate cause, duty or the medical basis for the plaintiffs' claims. We intimate no views on the merits of the claim; we address here only the question of subject matter jurisdiction.

The Wests filed their complaint under the Federal Tort Claims Act. 28 U.S.C. § 1346 and §§ 2671-2680. Stanley

and Ann were not physically injured by the Army's alleged negligence; their claims all derive from the injuries of their daughters.[2] The United States moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted. The district court concluded that the daughters' alleged injuries arose out of or were incident to Stanley's military service and that subject matter jurisdiction was therefore lacking under the doctrine of *Feres* v. *United States*, 340 U.S. 135, 146, 71 S.Ct. 153, 159, 95 L.Ed. 152 (1950).

II.

In *Feres* the Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159. The FTCA does not explicitly bar such actions for service-connected injuries, but the Supreme Court concluded that Congress had not intended to permit members of the armed forces to sue for such injuries. The Court acknowledged that it had few guides for its interpretation and suggested that if Congress disagreed, it could readily correct the problem. 340 U.S. at 138, 71 S.Ct. at 155. Congress has not amended the FTCA to permit such claims. In recent years the Court has reaffirmed *Feres* and

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[2] There are four counts in the complaint. In Count One, Ann West as administrator of Lorri's estate seeks damages for Lorri's pain and suffering before her death. In Count Two, Ann as administrator of Lorri's estate seeks damages for Lorri's wrongful death. In Count Three, Stanley and Ann as parents of Lindsay and Lorri seeks damages for medical expenses and funeral expenses. Finally, in Count Four, Stanley and Ann as parents and guardians of Lindsay seek damages for Lindsay's pain and suffering, medical expenses and physical disabilities.

expanded its scope to bar third-party claims for indemnification based upon injuries to service personnel. *See Chappell* v. *Wallace*, ... U.S. ....., ..., 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983) (*Feres* doctrine is important protection for military discipline); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673, 97 S.Ct. 2054, 2058, 52 L.Ed.2d 665 (1977) (barring claims for indemnification).

Plaintiffs argue that *Feres* does not apply to this case because the alleged negligent conduct occurred before Stanley was inducted into the service and because the injuries to his daughters occurred after his discharge. The government contends that the alleged negligent mistyping of Stanley's blood was incident to his military service and that the case therefore falls within the *Feres* doctrine. In our view, the alleged negligence was "incident" to Stanley's military service, but that conclusion does not bar these claims based on injuries to his daughters.

Several cases have addressed the *Feres* doctrine with regard to alleged negligence in pre-induction physical examinations. In *Joseph* v. *United States*, 505 F.2d 525 (7th Cir. 1974); *Redmond* v. *United States*, 331 F.Supp. 1222 (N.D.Ill.1971); and *Healy* v. *United States*, 192 F.Supp. 325 (S.D.N.Y.), *aff'd*, 295 F.2d 958 (2d Cir. 1961), plaintiffs alleged that military doctors negligently failed to diagnose physical conditions which should have disqualified the individuals from military service. In *Joseph* and *Healy*, the individuals went into basic training where the strenuous activities aggravated the conditions which should have disqualified them from service. While it was clear in both cases that the alleged negligence occurred before the individuals entered military service, the courts held that because the *injuries* occurred in basic training—obviously an essential part of military service—the *Feres* doctrine ap-

plied to bar the actions. Injuries to service personnel that occurred during basic training were incident to military service and thus squarely within the *Feres* holding. This court in *Joseph* suggested that the doctrine probably would not apply to malpractice which occurred in a pre-induction physical and which resulted in *immediate injury*. 505 F.2d at 526 n. 1. At the time of the pre-induction physical, the individual is still a civilian, and the *Feres* doctrine does not prohibit recovery by civilians injured by non-combatant military activity.[3]

In this case, the alleged negligence may have occurred when Stanley was still a civilian. The mistyping of his blood might have occurred immediately, before his induction, or it might have occurred later when, for example, his dog tags may have been misprinted. However, in our view the appropriate inquiry is the broader question whether the Army's alleged negligence was "incident" to the service member's military service. We think that the allegedly negligent mistyping of Stanley's blood was incident to his military service. The purpose of the blood typing at the pre-induction physical is not to determine whether the person is fit for military service but is instead to provide information on dog tags and in personnel records for future medical treatment in the military. According to the complaint, Stanley did not learn the results of the blood typing until he was issued his dog tags in basic training. (If he had not been inducted, there would have been no reason for the Army to inform him of the results of the blood test.) According to the complaint, the Army's

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[3] In *Redmond*, *supra*, the district court held that the Army's conduct in determining whether a soldier was qualified to serve was "inseparably intertwined" with the soldier's military service. 331 F.Supp. at 1224. That holding has been qualified, however, by this court's later decision in *Joseph*, 505 F.2d at 526 n. 1.

negligence was not completed until the Army issued Stanley his dog tags and thus negligently informed him of his blood type. Under these circumstances, therefore, the Army's alleged negligence was incident to Stanley's military service.

III.

The more difficult issue in this appeal arises from the fact that it was Stanley's daughters, not Stanley, who were allegedly injured by the Army. The *Feres* holding was that the government is not liable under the FTCA "for injuries to *servicemen* where the injuries arise out of or in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159 (emphasis supplied). However, *Feres* also bars claims that derive from injuries to service personnel; for example, *Feres* itself and one of its companion cases involved claims by civilian survivors of servicemen who died in military service.

In applying *Feres* to tort claims by family members of military personnel, two lines of cases have emerged. In the first line, courts have interpreted the doctrine to bar the claims of family members which *derive from* the injury to the service member, including, for example, claims for loss of consortium or companionship. *See, e.g., DeFoni* v. *United States*, 453 F.2d 1239 (1st Cir.) (denying spouse's claims for mental anguish and loss of support and companionship), *cert. denied*, 407 U.S. 910, 92 S.Ct. 2436, 32 L.Ed.2d 684 (1972); *Van Sickel* v. *United States*, 285 F.2d 87 (9th Cir. 1960) (denying family's claims for wrongful death based on military doctors' negligence); *Harrison* v. *United States*, 479 F.Supp. 529 (D.Conn.1979) (denying wife's claim for loss of consortium), *aff'd mem.*, 622 F.2d 573 (2d Cir.), *cert. denied*, 449 U.S. 828, 101 S.Ct. 93, 66 L.Ed.2d 32 (1980). *See also Lombard* v. *United States*,

690 F.2d 215, 225 nn. 17 & 18 (D.C.Cir.1982) (collecting cases), *cert. denied*, ... U.S. ....., 103 S.Ct. 3086, 77 L.Ed. 2d 1347 (1983).

However, in the second line of cases, the *Feres* doctrine has not applied to bar claims where spouses and children of service members have been injured *in their own right* by military personnel. This situation has often arisen where military medical personnel negligently treat a spouse or child. *See, e.g., Portis* v. *United States*, 483 F.2d 670 (4th Cir. 1973) (serviceman's child treated negligently in military hospital); *Williams* v. *United States*, 435 F.2d 804 (1st Cir. 1970) (negligent refusal to admit serviceman's child to military hospital); *Costley* v. *United States*, 181 F.2d 723 (5th Cir.1950) (negligent treatment of sergeant's wife in delivery of child in military hospital). *See also Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978) serviceman's wife shot by husband negligently released from military hospital).

It is difficult to classify the claim before us as purely *derivative* of Stanley's injuries (since the claim does not arise out of any injury to Stanley). Yet it is not wholly independent of Stanley's service, for we have determined that the blood typing itself was incident to his military service. In a recent case involving injuries to a soldier and his children, the District of Columbia Circuit has resolved the tension between these two lines of cases by reading narrowly the "independent injury" line and by holding *Feres* to bar claims by family members where "each claim had its 'genesis' in an injury to a serviceman incident to military service." *Lombard* v. *United States*, *supra*, 690 F.2d at 226. In *Lombard* the court held that the wife and children of a soldier could not sue for genetic injuries allegedly caused by the soldier's exposure to radiation while working on the "Manhattan Project." That decision

is in accord with several other recent decisions involving genetic injuries allegedly caused by a service member's exposure to radiation or chemicals in the course of military service. *See, e.g., Mondelli* v. *United States*, 711 F.2d 567 (3rd Cir. 1983) (radiation), *cert. denied*, ... U.S. ....., 104 S.Ct. 1272, 78 L.Ed.2d ..... (1984); *Monaco* v. *United States*, 661 F.2d 129 (9th Cir. 1981) (radiation), *cert. denied*, 456 U.S. 989, 102 S.Ct. 2269, 73 L.Ed.2d 1284 (1982); *In re Agent Orange Product Liability Litigation*, 506 F. Supp. 762, 776-81 (E.D.N.Y. 1980) (herbicides). In these cases the courts decided that because the children's claims had their "genesis" in their father's injuries incident to military service, the *Feres* doctrine applied to bar their claims.

But the holdings of *Feres* and subsequent Supreme Court decisions do not apply by some inescapable logic to the present claims by a soldier's daughters. The "derivative injury" and "independent injury" lines of cases do not provide convenient categories easily applicable to this situation where the children's injuries have a causal connection with their father's military service but not with any military injuries he may have suffered. Therefore, in our view, the proper application of *Feres* to the children's claims in this case requires us to consider the matter before us in terms of the policies underlying the *Feres* doctrine. In its decisions interpreting *Feres*, the Supreme Court has consistently considered *Feres* in terms of those policies. *See Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 672-74, 97 S.Ct. 2054, 2058-59, 52 L.Ed.2d 665 (1977) (application of *Feres* to third-party claims for indemnification); *United States* v. *Muniz*, 374 U.S. 150, 159-62, 83 S.Ct. 1850, 1856-57, 10 L.Ed.2d 805 (1963) (tort claims by federal prisoners); *Chappell* v. *Wallace*, ... U.S. ....., ..., 103 S.Ct. 2362, 2365, 76 L.Ed.2d 586 (1983)

(*Bivens* actions by service members). *See also Citizens National Bank of Waukegan* v. *United States*, 594 F.2d 1154, 1156-57 (7th Cir. 1979) (examining *Feres* policies applicable to claim based on intentional torts). Similarly, the courts in *Monaco* and *Mondelli* addressed the issues in terms of the policies underlying *Feres*. Our analysis of those policies as they apply to this case persuades us that *Feres* does not bar plaintiffs' claims based on the alleged negligence related to Stanley's pre-induction physical examination.

As the *Feres* doctrine has evolved, three major policy considerations have emerged as the basis of the doctrine. *See Stencel Aero, supra*, 431 U.S. at 672-73, 97 S.Ct. at 2058. First, the relationship between the government and a member of the armed forces is "distinctively federal" in character, *Feres*, 340 U.S. at 143, 71 S.Ct. at 157-58, and the Court has been reluctant to let liability for service-connected injuries hinge on state law under the FTCA. Second, the government provides a no-fault statutory compensation system for military personnel, and in most situations the Court has not permitted service members to recover additional compensation under the FTCA. 340 U.S. at 144-45, 71 S.Ct. at 158-59. It is clear that these first two factors are not present in this suit based on injuries to a service member's children. The children have no "distinctively federal" relationship to the government, nor are they eligible for benefits under the government's alternative compensation system. *See Mondelli* v. *United States, supra*, 711 F.2d at 569 n. 5. Therefore, if the *Feres* doctrine is to apply at all here, it must be because this action implicates the third *Feres* factor, the protection of military discipline.

The Court in *Feres* was concerned about the possibility that lawsuits by military personnel would have detrimental effects on military discipline. As the Court said in *United*

States v. *Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954), *Feres* was based upon the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." The Court has consistently emphasized the importance of this concern for military discipline. *See Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-72, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665 (1977); *United States* v. *Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 1857, 10 L.Ed.2d 805 (1963). Just last term, the Court noted that concern for military discipline was the best explanation of the *Feres* doctrine. *Chappell* v. *Wallace*, *supra*, ... U.S. at ....., 103 S.Ct. at 2365.

This "military discipline" factor is a shorthand means of anticipating the consequences of having civilian courts inquire extensively into military affairs. *Hunt* v. *United States*, 636 F.2d 580, 599 (D.C.Cir. 1980). The Supreme Court has not wanted civilian courts to "second-guess" military orders or to require members of the armed forces to testify as to one another's decisions and actions. *Stencel Aero*, *supra*, 431 U.S. at 673, 97 S.Ct. at 2058. Last year the Court held in *Chappell* v. *Wallace*, *supra*, that military personnel could not sue their superior officers under the Constitution for alleged racial discrimination because such suits might undermine the "special nature of military life" and "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel." ..... U.S. at ....., 103 S.Ct. at 2367.

However, it is important to recognize that the military discipline factor is not an absolute. The civilian courts may inquire into military actions which have injured civil-

ians even if the courts might in some degree have to "second-guess" military decisions or require members of the armed forces to testify about their decisions and actions. *Cf. Stencel Aero, supra*, 431 U.S. at 673, 97 S.Ct. at 2058. If military activity injures civilians as well as military personnel, the civilians may bring a tort claim against the government even though the case requires precisely the same inquiry that suits by military personnel would require. *See Stencel Aero, supra*, 431 U.S. at 676-77, 97 S.Ct. at 2060 (Marshall, J., dissenting); *Hillier* v. *Southern Towing Co.*, 714 F.2d 714, 723 (7th Cir. 1983). *See also Peterson* v. *United States*, 673 F.2d 237 (8th Cir. 1982) (injuries to persons and livestock caused by negligent operation of bomber during training flight); *Allen* v. *United States*, 527 F.Supp. 476 (D.Utah 1981) (civilians allegedly injured by nuclear weapons tests); *Lakeland R-3 School District* v. *United States*, 546 F.Supp. 1039 (W.D.Mo. 1982) (school damaged by Army demolition exercise).[4] It is, of course, true that if the injured party is a civilian, "military discipline" is not as obviously implicated as when a service member is harmed. In any event, the fact that a lawsuit might involve some inquiry into military activities is not, without more, a reason for barring the plaintiffs' claims. For example, the Third Circuit recently held that a soldier's mother could sue for wrongful death when another soldier killed her son, who was on leave at the time of his death. *Shearer* v. *United States*, 723 F.2d 1102, 1105-06 (3rd Cir. 1983). The court held that *Feres* did not apply because the victim was on leave and the injury thus was not incident

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[4] The FTCA does not, however, apply to claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j), or to claims based upon a "discretionary function or duty" of the government. 28 U.S.C. § 2680(a).

to his military service. It is highly unlikely that the lawsuit's inquiries into military affairs (such as the Army's allegedly negligent release of the killer from custody) would be affected by whether the victim was on leave, yet the need for inquiry into military affairs was not a sufficient ground for barring the claim under *Feres*.[5] Because the military discipline factor is not therefore an absolute and, in any event, is of somewhat diminished significance when a civilian is harmed, we must therefore consider the extent to which maintenance of the present action, and other similar actions, would threaten military discipline.

We believe that the threat to military discipline in this case is minimal. The plaintiffs are not asking the court to inquire into activities which are distinctively military in nature. They are alleging only that government personnel negligently mistyped Stanley's blood. These allegations in no way implicate distinctively military activity; blood typing presumably occurs generally in hospitals and clinics—wherever transfusions can be given. And it is difficult to imagine how an inquiry into the Army's per-

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[5] The Fifth Circuit's two opinions in *Johnson* v. *United States* are also illuminating. There a mentally ill soldier had been negligently released from a military hospital; he shot and wounded his wife and then shot and killed himself. In its first opinion, *Johnson* v. *United States*, 576 F.2d 606 (5th Cir. 1978), the court held that the wife could recover for her own injuries, and the government apparently never even raised a *Feres* defense. In the second opinion, *Johnson* v. *United States*, 631 F.2d 34 (5th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981), the court held that *Feres* barred the wife's claim for her soldier-husband's death. Thus, although the claims for the wife's injuries and for her husband's death required examination of precisely the same military actions leading to her husband's release, *Feres* barred only the claim based on the soldier's death, not the claim for the civilian's own injuries.

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formance of a simple, straightforward laboratory procedure or perhaps the imprinting of dog tags could threaten the military relationships which are the primary focus of the *Feres* doctrine. Thus any concerns about military discipline are far less substantial in this case than they were in *Mondelli*, *Lombard*, *Monaco* and *Agent Orange*. The radiation and Agent Orange cases involved challenges to activity integral and perhaps unique to military duty, training and combat. For example, the soldiers in *Lombard* and *Monaco* had allegedly been exposed to radiation while working on the Army's top secret "Manhattan Project" to develop an atomic bomb during World War II. According to the complaint in *Mondelli*, the plaintiff's father was ordered to stand near the site of a test nuclear explosion and then to march toward the blast area without protective clothing. The soldiers in *Agent Orange* had been exposed to herbicides in southeast Asia during the Vietnam War or in the course of distributing herbicides for use in southeast Asia. 506 F.Supp. at 776-77. Each of these cases therefore would have involved inquiry into activity integral to the soldiers' military duty and training.

By contrast, this case involves only an inquiry into a routine medical test which happened to be performed by Army medical personnel. The case seems to present no threat at all to military discipline. There is nothing of distinctive military character in a test of blood type or the communication of its results. The court will not have to inquire into the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Gilligan* v. *Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2445, 37 L.Ed.2d 407 (1973), nor will an inquiry into the blood mistyping undermine the "special nature of military life" or "the need for unhesitating and decisive action by military officers and equally disciplined

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responses by enlisted personnel," *Chappel* v. *Wallace*, *supra*, ... U.S. at ....., 103 S.Ct. at 2367. Thus, whatever threat to military discipline might lurk in the children's radiation and Agent Orange cases is not present here. *Cf. Stanley* v. *United States*, 574 F.Supp. 474, 479-81 (S.D.Fla. 1983) (inquiry into plaintiff's voluntary participation in Army's test of LSD did not threaten to compromise military discipline).

The fact that the alleged mistyping occurred in connection with Stanley's pre-induction physical is also relevant to our determination that military discipline is not implicated here. Stanley was a civilian at the time of the examination, and the *Feres* doctrine certainly does not prevent courts from examining military activity which impacts upon civilians immediately as well as injuring them ultimately. Stanley's ties to the military at the time of the examination were minimal. Although we have concluded that the blood test was "incident" to his service for purposes of the Federal Tort Claims Act, the relationship certainly was not a strong one. An inquiry—based upon his daughters' claims—into this peripheral aspect of his service simply does not raise the disturbing prospects which are the foundation of the *Feres* doctrine.

We recognize that courts have been reluctant to decide on a case-by-case basis whether pursuit of a particular claim would threaten military discipline, at least where the claims are for *injuries to service personnel*. *See, e.g., Hunt* v. *United States*, 636 F.2d 580, 599 n. 51 (D.C.Cir. 1980). For example, under our analysis here, few medical malpractice actions would threaten military discipline, yet the courts have consistently applied the *Feres* doctrine to bar such claims *by service personnel*. *See, e.g., Jefferson* v. *United States*, 340 U.S. 135, 137, 71 S.Ct. 153, 155, 95 L.Ed. 152 (1950) (decided with *Feres*); *Collins* v. *United*

States, 642 F.2d 217 (7th Cir.), *cert. denied*, 452 U.S. 964, 101 S.Ct. 3115, 69 L.Ed.2d 975 (1981); *Veillette* v. *United States*, 615 F.2d 505, 507 (9th Cir. 1980); *Vallance* v. *United States*, 574 F.2d 1282 (5th Cir.), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978). Where a malpractice claim arises from an injury to a member of the armed forces, we do not question the application of *Feres* or the courts' reluctance to weigh in each case the threat to military discipline. In malpractice actions for injuries to service personnel themselves, the other *Feres* factors—the distinctively federal relationship and the alternative compensation scheme—are present and justify application of the doctrine. By contrast, in this case neither of the other *Feres* factors is present, and prior decisions do not appear to control this claim by the soldier's daughters. Therefore, in the absence of these other guides, it is necessary to weigh the importance in this case of the concern for military discipline, for it is the only arguable justification for applying the *Feres* doctrine here.[6]

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[6] In a recent case the Fifth Circuit applied the *Feres* doctrine to bar a claim by a child who alleged that he was injured by the negligence of Air Force medical personnel who treated his mother while she was in the Air Force and was pregnant with the child. *Scales* v. *United States*, 685 F.2d 970, 973-74 (5th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1772, 76 L.Ed.2d 344 (1983). The court reasoned that a suit by the mother based on her own treatment would be barred under *Feres*, in part because it might threaten military discipline. Because a suit by the child she had been carrying would have involved an inquiry into the same treatment, the court concluded the child's lawsuit would also threaten military discipline and would also be barred by *Feres*. 685 F.2d at 974. It appears that the mother in *Scales* was herself injured by the negligent treatment. In this case, by contrast, the alleged negligence never injured the father who was in the Army. Only civilians were injured. For the reasons set forth above, we believe that the

(footnote continued)

Where the threat to military discipline is minimal, and where neither of the other *Feres* policies is implicated in any way, we will not extend *Feres* to these children's claims. The *Feres* doctrine is a judicially-created exception to the applicability of a broad remedial statute. While the doctrine has withstood the test of time, *Feres* and its progeny do not require us to broaden the doctrine beyond the scope of the policies which are its foundation—particularly when we are confronted with purely civilian injuries.

For the foregoing reasons, we reverse the judgment of the district court dismissing the action for lack of subject matter jurisdiction, and we remand the case for further proceedings. Circuit Rule 18 shall not apply on remand.

REVERSED AND REMANDED.

(footnote continued)
concern for military discipline is far less substantial when the injured party is a service member's child. The fact that a lawsuit involves an inquiry into the conduct of persons employed by the armed forces does not bar all claims by all persons. *See Kohn* v. *United States*, 680 F.2d 922, 925-26 (2d Cir. 1982) (*Feres* barred parents' derivative claims based on son's death but did not bar independent claims for Army's actions after son's death); *Johnson* v. *United States*, *supra*, 631 F.2d at 36-37 (discussed *supra* at note 5). Civilians injured by military activity can sue under the FTCA. And their right to sue is not affected by the fact that the inquiry is into the conduct of military personnel toward other military personnel. *Shearer* v. *United States*, 723 F.2d 1102, 1106 (3rd Cir. 1983) (negligent release of soldier from military custody); *Underwood* v. *United States*, 356 F.2d 92 (5th Cir. 1966) (negligent release of mentally ill airman from hospital; *Feres* defense not asserted). When military personnel injure civilians, except through combat activities during time of war, the victims may generally pursue a claim regardless of the fact that the lawsuit requires inquiry into military affairs. *See supra* note 4.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 25, 1984

Before

Hon. Walter J. Cummings, Chief Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge

L. ANN WEST, as Mother and Administrator of the Estate of Lorri West, et al.,

Plaintiffs-Appellants,

No. 83-1842 vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States Court for the Central District of Illinois, Peoria Division.
No. 82 C 1235
Michael M. Mihm, *Judge*.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by counsel for the defendant-appellee in the above-entitled cause, the panel which originally heard the case voted to deny rehearing. A vote of the active members of the Court was requested, and a majority of the judges in regular active service voted to grant a hearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on March 14, 1984 be and hereby are VACATED. This case will be heard *en banc* at the convenience of the Court.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
October 4, 1984

Before

Hon. Walter J. Cummings, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
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ORDER

On June 25, 1984, this Court ordered that the panel judgment and opinion reported in 729 F.2d 1120 be vacated and that the case be reheard *en banc*. After rehearing this case *en banc* today, by equally divided vote this Court affirms the judgment of the district court dismissing the action for lack of subject matter jurisdiction under *Feres v. United States*, 340 U.S. 135.